

STATE OF MICHIGAN
COURT OF APPEALS

BRADLEY DELONG,

Plaintiff-Counter-
Defendant/Appellee,

v

SAMUEL RAYMER and DIAMOND
AVIATION, INC.,

Defendants-Counter-
Plaintiffs/Appellants.

UNPUBLISHED

August 19, 2003

No. 237476

Muskegon Circuit Court

LC No. 00-039989-CK

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Defendants appeal by leave granted, the trial court's October 2, 2000, order partially granting plaintiff's motion for summary disposition. Defendants also appeal the trial court's November 1, 2000, order granting plaintiff summary disposition on defendants' counterclaim. We affirm in part and reverse in part.

In this case we are asked to determine whether summary disposition was an appropriate avenue to adjudicate defendant Raymer personally liable under the contract entered into by the parties. We must also decide whether the trial court properly granted summary disposition on defendants' counterclaim for fraud. We conclude that the terms in the contract were ambiguous and created questions of fact not subject to summary disposition. However, defendants counterclaim was properly dismissed because defendants failed to present any evidence to support their claim.

I. Factual Background

Plaintiff Bradley DeLong and defendant Samuel Raymer were shareholders of defendant Diamond Aviation, Inc., an aircraft freight business. Plaintiff and defendant Raymer had a disagreement regarding the ownership and operation of the business. This disagreement culminated in defendant Raymer bringing suit against plaintiff for the misuse of corporate funds. The parties ultimately agreed to settle their differences and signed a settlement agreement on March 11, 1999. This agreement is the subject of the instant dispute.

The settlement agreement was between plaintiff DeLong and J & B Leasing, LLC (hereinafter “transferor”) and defendants Diamond Aviation, Inc. and Samuel Raymer (hereinafter collectively “transferee”). Pursuant to the agreement, plaintiff agreed to transfer all of his shares of common stock in Diamond Aviation to defendant Raymer. Plaintiff further transferred all of his interest in J & B Leasing to transferee. The agreement also contained a release of claims clause, whereby the parties forgave, released, and discharged each other from any liabilities or claims, known or unknown, that each may have against the other.

The controversial portion of the settlement agreement relates to the indemnification of plaintiff from certain liabilities. Paragraph 4(C) of the agreement, provides as follows:

Diamond Aviation, Inc. agrees to hold Transferor harmless from the payment of any of the outstanding liabilities and/or obligations listed on Exhibit A hereto, and agrees to assume and pay those liabilities and/or obligations listed in Exhibit A, as the same come due, said liabilities and/or obligations listed on Exhibit A being the liabilities and/or obligations of Diamond Aviation, Inc. and/or J & B Leasing, L.L.C. Transferee shall pay those items listed on Exhibit A,^[1] regardless of whether they have been personally guaranteed by Transferor.

Plaintiff signed the settlement agreement as a member of J & B Leasing, L.L.C. and individually as a shareholder in Diamond Aviation, Inc. Defendant Raymer signed the agreement individually and as president of Diamond Aviation, Inc. Exhibit A to the settlement agreement was signed by plaintiff and by defendant Raymer for Diamond Aviation, Inc.

A separate document, dated March 11, 1999, was also signed by plaintiff and Peter R. Tolley, attorney for defendant Raymer. This document provides as follows:

If the obligations recited in the agreement between Brad DeLong and Sam Raymer are not paid in due course, with the result that Brad DeLong is constrained to file suit to enforce the indemnity provisions herein, then in that event, the balance of the Caughey debt (over and above the \$7000.00 recited in exhibit A to the agreement) shall be added to DeLong’s damages in such indemnity action.

Defendants neglected to pay the liabilities listed in Exhibit A and plaintiff filed a complaint for breach of agreement. Defendants subsequently filed a counterclaim alleging that plaintiff committed fraud and misrepresentation when he procured the agreement. The trial court granted summary disposition on the indemnification issue holding that paragraph 4(C), while admittedly poorly worded, specifically provided that transferee was required to pay for the items listed in Exhibit A. The trial court later dismissed defendants’ counterclaim for failure to offer any factual support.

II. Standard of Review

¹ Exhibit A lists seven items that total approximately \$260,000 in liabilities and obligations.

A trial court's grant or denial of summary disposition is reviewed de novo on appeal to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Likewise, we review de novo the proper construction and interpretation of a contract. *Perry v Sied*, 461 Mich 680, 681, n 1; 611 NW2d 516 (2000).

A motion for summary disposition, pursuant to MCR 2.116(C)(10), tests the factual support of a plaintiff's claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

III. Indemnity Contract

Initially, defendants contend that the trial court erroneously granted plaintiff's motion for summary disposition on the indemnity claim. We agree.

"An indemnity contract is construed in accordance with the rules for the construction of contracts in general." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). The primary goal in the interpretation of contracts is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Where the language in an indemnity contract is clear, its construction is a question of law for the court to decide. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). However, when the language is unclear or susceptible to multiple meanings, interpretation becomes a question for the trier of fact. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). Thus, "[i]f the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties." *UAW-GM Human Resource Ctr, supra* at 492; see also *D'Avanzo, supra* at 319.

After reviewing the contract in question, we find that the indemnification section is susceptible to multiple interpretations. The first sentence of paragraph 4(C) states that *Diamond Aviation* agrees to assume liability and hold transferor harmless from the payment of any of the outstanding liabilities listed in Exhibit A. However, the next sentence then goes on to indicate that *transferee* shall pay those items listed on Exhibit A. The agreement specifically defines the term "transferee" as including both defendant *Diamond Aviation* and defendant *Raymer*. These two sentences are obviously inconsistent, stating in one instance that only *Diamond Aviation* is liable and then providing that both defendants are liable for the items listed in Exhibit A.

We also note that the circumstances surrounding the parties do not resolve this ambiguity. *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 192; 660 NW2d 730 (2003). Defendant *Raymer* presented an affidavit to the trial court averring that there was never any intention among the parties that he would incur a personal obligation to plaintiff under the settlement agreement. In his appellate brief, defendant calls such a conclusion "ludicrous" given the fact that plaintiff had been allegedly stealing from him. However, plaintiff's former attorney, *Robert Engel*, submitted an affidavit wherein he stated that defendant *Raymer* agreed to be personally

liable in the event that Diamond Aviation was unable to pay its obligations. Mr. Engel claimed that defendant Raymer signed the March 11, 1999 agreement as an individual and as the president of Diamond Aviation, Inc. Accordingly, the trial court erroneously granted plaintiff's motion for summary disposition on the indemnity contract.

Defendants further contend that despite any factual dispute regarding intent, defendant Raymer cannot be held personally liable as a matter of law. They base this argument on the fact that defendant Raymer signed Exhibit A to the agreement "for the corporation." Defendants contend that Michigan law treats a corporation as an entirely separate entity from its shareholders, even where one person owns the corporation's stock. However, because defendants failed to raise this argument before the trial court, it is not preserved for appellate review. *Camden v Kaufman*, 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000).

IV. Counterclaim

Defendants further assert that the trial court improperly dismissed their counterclaim. Specifically, defendants argue that summary disposition was premature as no discovery was conducted into their allegations of fraud and misrepresentation. We disagree.

According to defendants, plaintiff fraudulently obtained the settlement agreement in question. In their complaint, defendants maintained that this fraud stemmed from plaintiff's failure:

to disclose material information regarding the status of the corporation, which resulted in the loss of leasehold, and the inability of the corporation to continue as a Fixed Base Operator at the Muskegon County Airport, and . . . other material facts, which facts, if known to Raymer, would have resulted in Raymer not entering into the agreement.

At the hearing on the first motion for summary disposition, defendants' counsel stated that the *only* thing plaintiff failed to disclose concerning the instant case was the fact that the rent had not been paid in a timely fashion. These late payments led to the termination of Diamond Aviation, Inc.'s lease shortly after the settlement agreement was signed. However, plaintiff's counsel presented two of the rent checks for January and February 1999 that were personally signed by defendant Raymer, and a third rent check that was signed on May 11, 1999, by the management company hired by defendant Raymer. Plaintiff also submitted a letter, dated May 17, 2000, listing the dates in which the January, February, and March 1999 rent payments were made. The record clearly indicates that defendant Raymer was aware of the late rent payments.

Moreover, defendants presented no evidence to support their claim that plaintiff otherwise fraudulently induced them to sign the settlement agreement. A mere promise to produce evidence is insufficient to avoid summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121.

We disagree with defendants' claim that the trial court improperly dismissed their counterclaim when no discovery had been conducted. "As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), quoting *Dep't of Social Services v*

Aetna Casualty & Surety Co, 177 Mich App 440, 446; 443 NW2d 420 (1989). Defendants neglected to raise this argument before the trial court. See *Camden*, *supra* at 400, n 2. Nevertheless, we note that six months passed between plaintiff's first motion for summary disposition and the final hearing dismissing defendants' counterclaim. Indeed, there is no indication that defendants commenced any discovery during this period. Therefore, the trial court did not err in granting plaintiff's motion for summary disposition as to defendants' counterclaim.

Affirmed in part and reversed in part. We remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood